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Supreme Court, U.S.
FILED
DEC 8 1996
CLERK

No. 96-731

In The

Supreme Court of the United States

October Term, 1996

CHARLES AND CLAUDIA SCHULTZ,

Petitioners,

vs.

CONSOLIDATION COAL COMPANY,
a foreign corporation, and BERT SHELEK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Contrary to the statement of jurisdiction in the Petition, this Court is without jurisdiction under 28 U.S.C. § 1257(a). As argued hereinafter, the validity of a federal treaty or statute is not drawn in question, the validity of a state statute is not drawn into question as repugnant to federal law, and Petitioners do not set up any title, right, privilege or immunity under federal law.

STATEMENT OF THE CASE

A. Procedural Background

Petitioners originally filed their Complaint on February 5, 1993, in the Circuit Court of Marshall County, West Virginia, seeking a monetary award in connection with alleged damage to their surface property as a result of Respondent Consolidation Coal Company's underground mining operation, and asserting claims for common law fraud and violations of federal and state statutes regulating surface mining. Respondents removed the action to the United States District Court for the Northern District of West Virginia on March 11, 1993, in part on the ground that Petitioners asserted claims under federal law.

Petitioners thereupon moved pursuant to Rule 41, of the Federal Rules of Civil Procedure, to dismiss all federal claims, and moved for remand on the ground that without any federal claim the District Court lacked jurisdiction. The District Court subsequently granted Petitioners' motion, dismissed all federal claims with

prejudice, and by order entered January 21, 1994, remanded the matter to State Court.

By order entered May 22, 1995, the Circuit Court of Marshall County, West Virginia, granted Respondents' motion for summary judgment as to the remaining, state law claims (the Circuit Court's order is attached to the Petition as Appendix B). Petitioners appealed to the Supreme Court of West Virginia, and by order entered July 12, 1996, the West Virginia Supreme Court unanimously affirmed the grant of summary judgment (Petition, App. A).

B. Facts

The Court's attention is invited to Appendix A to the Petition wherein the West Virginia Supreme Court provides a recitation of the facts of record before the State Court.

Respondents take issue with Petitioners' statement of facts as the same is argumentative, and omits material facts of record as set forth in the State Court's opinion. As an example, Petitioners state that Respondent Shelek first met with Petitioners regarding the Subsidence Agreement in August of 1992, immediately before the same was signed. However, as recited by the West Virginia Supreme Court, Shelek first met with Petitioners six-months earlier, in February, 1992, and presented the agreement at that time (Pet. App. A, p. 5). Further, Petitioners fail to report that between February and August, 1992, Petitioners consulted independent legal counsel regarding the Agreement (Pet. App. A, pp. 6-7), which has obvious relevance to the question of whether Petitioners relied

upon the alleged misrepresentations by Shelek. Finally, Petitioners also fail to reveal that after consulting with counsel, Petitioners received and accepted substantial monies in consideration of their execution of the Subsidence Agreement (Pet. App. A, p. 7, n. 4).

REASONS FOR DENYING THE PETITION

A.

THIS COURT IS WITHOUT JURISDICTION UNDER 28 U.S.C. § 1257(a).

Petitioners assert that jurisdiction exists under 28 U.S.C. § 1257(a) (Pet. p. 1). However, in relevant part, Section 1257(a) provides for certiorari only in cases (1) where the validity of a federal statute is drawn in question, (2) where the validity of a state statute is challenged on the ground of its repugnance to the Constitution or laws of the United States, or (3) where some title, right, privilege or immunity is claimed under the federal Constitution or laws. None of these necessary circumstances are presented in this case.

Nowhere in the Petition, including the underlying West Virginia trial court and appellate decisions, is the validity of any federal statute questioned, nor is it asserted by Petitioners that any state statute is repugnant to federal law. As well, Petitioners do not claim that Respondents' actions or the decision of this case in the State Courts violated any federal right or privilege. In fact, in order to defeat federal jurisdiction of this action in the early stages, Petitioners expressly waived any federal claims.

As recited above in the statement of procedural history, this action was originally filed in State Court and subsequently removed to the United States District Court for the Northern District of West Virginia upon grounds, *inter alia*, that the Petitioners included in their Complaint alleged violations of federal law by Respondents. In support of their motion to remand the action to State Court, Petitioners voluntarily dismissed all claims alleging violations of federal law. Attached hereto as Appendices A and B are, respectively, Petitioners' Motion for Voluntary Dismissal of Claims Alleging Violations of Federal Law, and Petitioners' Memorandum in support of that Motion. As set forth in Petitioners' Memorandum:

> The Plaintiffs in the Complaint also asserted a claim under federal law against the Defendants for violation of the Federal Surface Mining Control and Reclamation Act and regulations promulgated thereunder. The Defendants have removed this case from State Court to this Honorable Court in part on the basis that these claims raise federal question jurisdiction under 28 U.S.C. § 1331.
>
> Plaintiffs have determined that the claims arising under federal law, although well stated, are duplicitous of the claims which they have asserted under state law.
>
> . . .
>
> As a consequence, Plaintiffs seek the Court's permission to withdraw the federal claims so that this matter may be remanded back to state court for *disposition of the claim under state statutes and state common law.* (Emphasis added.) (Pet. App. B)

By order entered January 21, 1994, the District Court granted Plaintiffs' motion and dismissed all federal claims, with prejudice, and remanded the case to State Court where – as prayed by the Petitioners/Plaintiffs – the matter was resolved under state statutory and common law.

Accordingly, not only are federal claims and interests necessary to support jurisdiction under Section 1257(a) not asserted in the Petition, Plaintiffs disclaimed such claims during the course of this litigation expressly to defeat federal jurisdiction.

B.

THE PETITION SHOULD BE DENIED UNDER RULE 10, OF THE RULES OF THIS COURT.

The grounds discussed above for contesting jurisdiction under 28 U.S.C. § 1257(a) are also apposite to the denial of certiorari under Rule 10.

Under Rule 10, "a petition for writ of certiorari will be granted only for compelling reasons". *Sup. Ct. R. 10 (1995).* As to decisions of a State Court, under the standards set forth in the Rule the Petitioner must establish that an important federal question has been decided in a way which conflicts with the decision of another State Court, a United States Court of Appeals, or this Court, or that a federal question is presented which should be settled by this Court. Further, the Rule provides that a petition is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

As argued above regarding jurisdiction, the Petitioners have not asserted that any federal question is implicated in the decision rendered by the West Virginia Supreme Court, and have cited no authority to the effect that the decision in any manner conflicts with the decision of any federal Court, including this Court. In fact, and as argued above, Petitioners expressly waived any federal claims in order to defeat federal jurisdiction in support of their motion to remand this case to State Court.

As to the remaining standard governing certiorari, clearly this matter presents merely an allegedly erroneous factual finding by the State Court. Petitioners concede this point by their argument. At pages 4 and 5 of the Petition, Petitioners review the elements of their common law claim for fraud, and assert that the State Court made an erroneous finding in determining that Petitioners could not satisfy all of the elements. In this case, the West Virginia Supreme Court granted Respondents' motion based upon its finding that the Petitioners failed to adduce sufficient evidence to create a material issue of fact as to the elements of falsity and intent required to establish a common law claim for fraud.

The Court will note that the only real discussion of federal law in the State Court's decision appears in part A of the opinion where the Court reviews the legislative and rule-making history of the State surface mining regulations, and to some degree the corollary development of the Federal regulations (Pet. App. A, pp. 11-22). That history was reviewed with regard to Petitioners' allegation that the modification to State mining regulations necessary to support their theory of liability was effective

before the amendment was approved by the Federal Office of Surface Mining. The Court found that the history was so confusing that, as a matter of law, Petitioners could not support a finding that any false statement by Respondents as to the current state of the law was made knowingly and with intent to deceive:

> Since the whole procedural history behind the pertinent regulation is murky at best, it is impossible to find that the Appellees intentionally made material and false representations to the Appellants regarding their liability according to the Regulations. *Id*, p. 22.

Similarly, in part B of the Opinion the Court reviewed the treatment under applicable case law of the Respondents' common law right to subside the surface land, deriving from severance deeds under which Petitioners' predecessors in title conveyed the mineral estate, with reference to the continuing validity of those waivers under the Federal and State Surface Mining Acts. The Court found, and Petitioners do not dispute, that the statements allegedly made to the Petitioners by Respondents with regard to subsidence rights were consistent with the decisional law, and accordingly once again could not be alleged to be knowingly false:

> Because of these decisions, we cannot find that the Appellees' representations to the Appellants that Consol was not legally liable to them for damages resulting from subsidence in light of the valid severance deed waiver of subjacent support was either made with the intent to deceive or was a material and false representation. *Id*, at p. 26.

Vital to the present issue of whether certiorari should be granted is that the State Court's decision did not turn upon the issue of whether the subsidence waivers were or were not valid under state and federal law at the time of mining. Rather, the decision turned upon the undisputed finding that Respondents' statements were consistent with the state of the law as interpreted under decisional authority to date. Therefore the Court found that Petitioners could not establish that the statements were knowingly false and made with intent to deceive, a necessary element in the common law action for fraud.

Accordingly, in support of their Petition for Certiorari Petitioners are at best asserting that the State Court made an erroneous factual finding with regard to the elements of common law fraud, and accordingly no basis for the issuance of a Writ of Certiorari exists.

CONCLUSION

On the grounds set forth above, Respondents Consolidation Coal Company and Bert Shelek respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
WHEELING DIVISION

CHARLES SCHULTZ and CLAUDIA SCHULTZ,	)	
Plaintiffs,	)	CASE NO. 93-0072-W
vs.	)	Circuit Court of Marshall County Civil Action No. 93-C-50K
CONSOLIDATION COAL COMPANY, a foreign corporation, and BERT SHELEK,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL OF CLAIMS ALLEGING VIOLATIONS OF FEDERAL LAW

(Filed Mar. 26, 1993)

The Plaintiffs seek leave of Court pursuant to Rule 41(a)(2) of the Rules of Civil Procedure to dismiss all claims in their Complaint asserting violations of federal laws i.e., the Federal Surface Mining and Reclamation Act and the regulations promulgated thereunder as asserted in paragraphs 9, 18 and 19 of their Complaint.

/s/ Thomas C. Schultz
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I, David R. Ealy, Clerk of the Circuit Court of Marshall Co., WV, do hereby certify that the foregoing is a true and exact copy of the record in my office. Dated this 2nd day of Dec., 1996.

TESTE: David R. Ealy, Clerk
BY: /s/ Becky Fahey Deputy Clerk

CERTIFICATE OF SERVICE

Service of the foregoing Plaintiffs' Motion for Voluntary Dismissal of Claims Alleging Violations of Federal Law was had upon the Defendants by hand delivering a true copy thereof to their counsel of record, H. Brann Altmeyer, Esq., at his office located at 61 - 14th Street, Wheeling, WV 26003, this 26th day of March, 1993.

/s/ Thomas C. Schultz
Counsel for the Plaintiffs

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
WHEELING DIVISION**

CHARLES SCHULTZ and CLAUDIA SCHULTZ, Plaintiffs, vs. CONSOLIDTION COAL COMPANY, a foreign corporation, and BERT SHELEK, Defendants.	CASE NO. 93-0072-W Circuit Court of Marshall County Civil Action No. 93-C-50K

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL OF CLAIMS ALLEGING VIOLATIONS OF FEDERAL LAW

(Filed Mar. 26, 1993)

Statement of the Case

On February 5, 1993, Plaintiffs filed a civil action in the Circuit Court of Marshall County, West Virginia against Consolidation Coal Company and Bert Shelek asserting claims under State law: (1) violation of the West Virginia Surface Mining and Reclamation Action; (2) common law fraud; (3) common law intentional infliction of emotional distress; and (4) common law trespass.

The Plaintiffs in the Complaint also asserted a claim under federal law against the Defendants for violation of the Federal Surface Mining Control and Reclamation Act

and regulations promulgated thereunder. The Defendants have removed this case from State Court to this Honorable Court in part on the basis that these claims raise federal question jurisdiction under 28 U.S.C. §1331.

Plaintiffs have determined that the claims arising under federal law, although well stated, are duplicitous of the claims which they have asserted under state law.

The state law claims form the real basis for this action.

As a consequence, Plaintiffs seek the Court's permission to withdraw the federal claims so that this matter may be remanded back to state court for disposition of the claim under state statutes and state common law. Disposition of a Motion For Voluntary Dismissal under sub-section (a)(2) of Rule 41 is purely a matter of judicial discretion. *Wilson v. Ohio River Co.*, 236 F.Supp. 96 (S.D.W.VA. 1964).

Respectfully submitted this 26th day of March, 1993.

/s/ Thomas C. Schultz
Counsel for Plaintiffs

I, David R. Ealy, Clerk of the Circuit Court of Marshall Co., WV, do hereby certify that the foregoing is a true and exact copy of the record in my office. Dated this 2nd day of Dec., 1996.

TESTE: David R. Ealy, Clerk
BY: /s/ Becky Fahey Deputy Clerk